State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

RESEARCH APPENDIX -

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Date Added To File: 09/17/2003 (Per: PJK)

☞ The 2003 drafting file for LRB 03s0169/1

has been copied/added to the 2003 drafting file for

LRB 03–3297

☞ The attached 2003 draft was incorporated into the new 2003 draft listed above. For research purposes, this cover sheet and the attached drafting file were copied, and added, as a appendix, to the new 2003 drafting file. If introduced this section will be scanned and added, as a separate appendix, to the electronic drafting file folder.

☞ This cover sheet was added to rear of the original 2003 drafting file. The drafting file was then returned, intact, to its folder and filed.

LRBs0169

2003 DRAFTING REQUEST

Assembly Substitute Amendment (ASA-AB17)

Received: **09/05/2003**

Received By: **pkahler**

Wanted: **Soon**

Identical to LRB:

For: **Sheldon Wasserman (608) 266-7671**

By/Representing: **his office**

This file may be shown to any legislator: **NO**

Drafter: **pkahler**

May Contact: **Lucy Cooper**
(414) 344-6075

Addl. Drafters:

Subject: **Dom. Rel. - paternity**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Wasserman@legis.state.wi.us**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Nondismissal of action or motion to rebut presumption of paternity

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Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	pkahler 09/08/2003	kgilfoy 09/08/2003		_____ _____			State
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FE Sent For:

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To: Family Law Section Board of Directors
From: Lucy Cooper
Re: Possible Responses to AB 17
Date: 5/1/03

At our last meeting I volunteered to try to put the debate over AB 17 into some historical and legal perspective and suggest possible alternatives.

Background

Before addressing AB 17 itself which attempts to create an exception to two statutes which are themselves exceptions to the courtÆs normal procedures, it might be helpful to look at the laws regarding establishing paternity, ordering genetic tests, rebutting the marital presumption, the role of a guardian *ad litem*, and the issue of reopening judgments as to paternity.

The court in granting a divorce or legal separation has a duty to determine which children are covered by its orders. **Sec 767.07** provides as follows:

> ô**Judgment of Divorce or Legal Separation. à**
>
> (3) To the extent it has jurisdiction to do so the court has considered, approved or made provision for legal custody, the support of any child of the marriage entitled to support, the maintenance of either spouse, the support of the family under 767.261 and the disposition of the property.

There is a legal presumption that a child born to a woman during a marriage is the husbandÆs child. **Sec. 891.39** provides:

> **ôPresumption as to whether a child is marital or non marital; self crimination, birth certificates. (1)**(a) Whenever it is established in an action or proceeding that a child was born to a woman while she was the lawful wife of a specified man, any party asserting in such action or proceeding that the husband was not the father of the child shall have the burden of proving that assertion by a clear and satisfactory preponderance of the evidence. In all such actions or proceedings the husband and wife are competent to testify as witnesses to the facts. The court or judge in such cases shall appoint a guardian ad litem to appear for and represent the child whose paternity is questioned. Results of a genetic test, as defined in sec. 767.001(1m), showing that a man other than the husband is not excluded as the father of the child and that the statistical probability of the manÆs parentage is 99.0 % or higher constitute a clear and satisfactory preponderance of the evidence under this paragraph, even if the husband is

unavailable to submit to genetic tests, as defined in sec. 767.001(1m)

There is also a later enacted marital presumption based on subsequent marriage of parties, but also covering children born during a marriage. **Sec. 891.41** provides:

> **Presumption of paternity based on marriage of the parties. (1)** A man is presumed to be the natural father of the child if any of the following applies:
>
> a. He and the childÆs natural mother are or have been married to each other and to each other and the child is conceived or born after the marriage and before the granting of a decree of legal separation, annulment, or divorce between the parties.
>
> a. He and the childÆs natural mother were married to each other after the child was born but he and the childÆs natural mother had a relationship with one another during the period of time within which the child was conceived and no other man has been adjudicated to be the father or presumed to be the father under par. (a)
>
> (2) In a legal action or proceeding , a presumption under sub.(1) is rebutted by results of a genetic test, as defined in sec. 767.001 (1m) that show a man other than the man presumed to be the father under sub.(1) is not excluded as the father of the child and that the statistical probability of the manÆs parentage is 99.0 % or higher, even if the man presumed to be the father under sub.(1) is unavailable to submit to genetic tests, as defined in s. 767.001(1m)

The statutes clearly provide for the ordering of genetic tests to determine parentage: Sec. **885.23** provides as follows:

Genetic tests in civil actions: Whenever it is relevant in a civil action to determine the parentage or identity of any child, person, or corpse, the court, by order , shall direct any party to the action and any person involved in the controversy to submit to one or more genetic tests as provided in s. 767.48. The results of the tests shall be receivable as evidence in any case where exclusion from parentage is established or where a probability of parentage is shown to exist. Whenever the court orders the genetic tests and one of then parties refuses to submit to the tests that fact shall be disclosed upon trial.

So, just reading this far, it would appear that a party to an action for divorce or legal separation or annulment or independent action for support or custody has a

right to raise the issue of husbandÆs non paternity and that, once the issue is raised [by written motion or answer or counterclaimà???] the court is ***supposed to order genetic tests.***

However, there is a great deal of law that has grown up around the notion that husbands and wives should not be allowed to upset long settled assumptions about their families and relationships that children have come to rely upon. While the cases themselves fall into logical categories, the commentary among lawyers and judges is often all muddled and fails to distinguish between initial actions and various post divorce or post adjudication actions. Further, the terms ôequitable parentö and ôequitable estoppelö are currently tossed about pretty loosely by both courts and commentators. There are two statutes that have a bearing on the refusal to order genetic tests or to dismiss certain paternity actions; those statutes are **not** part of the divorce code at all, but are, rather, part of the paternity code that was grafted onto Ch. 767 beginning with Ch. 352 **LAWS** of 1979. The whole law of reopening judgments is separate from both, and addresses different issues , but is seen in the most litigants and many commentatorsÆ minds as part and parcel of the same questions about genetic realities. Whatever the legislature does with the marital presumption issue, it is vitally important to differentiate between litigantsÆ rights in initial actions and later attacks on a final judgment which addresses the paternity of a child.

First, letÆs look at general law of genetic tests in paternity actions[1] then at the two statutes allowing a court to refuse to order genetic tests in certain paternity establishment actions, since those are the statutes that AB 17 aims to modify. Next, we can try to make some sense of the cases concerning ôequitable estoppelö or ôequitable parentö. Then we can review the law of reopening paternity judgments or determination of marital children in a divorce action. And, finally, we can formulate a response to AB 17.

The General Rule: secs.767.45 STATS and sec. 767.58 STATS.

Sec. 767.45 **Determination of Paternity : (1)** The following persons may bring an action or motion , including an action or motion for declaratory judgment, for the purpose of determining the paternity of a child or for the purpose of determining the paternity of a child or for the purpose of rebutting the presumption of paternity under s. 891.405 or 891.41(1)

---

[1] These statutes are in addition to sec. 891. 39 and 885.23 already discussed. One of the many puzzles in the statutes is whether 767.45 is intended to relate to sec. 891.39. and how sec. 891.41 is supposed to relate to 891.39, since they overlap in their statements about the marital presumption for children born during a marriage. It is also confusing to try to relate the 767.48 genetic test statute to the 885.23 statute covering some of the same territory. The laws were drafted at different times, frequently as part of Budget bills, and there may be no better explanation than that. A party to a marital action who wishes to challenge the marital presumption should probably cite both statutes in his or her motion and specifically reference sec. 885.23 in any request for genetic tests.

a. the child
b. The childÆs natural mother
c. Unless s. 767.62 (1) applies, a man presumed to be the childÆs father under s. 891.405 or 891.41(1)
d. A man alleging himself to be the father of the child
e. The personal representative of a person specified under pars. (a) to (d) if that person has died
f. The legal or physical custodial of the child
g. The state, whenever the circumstances specified in s. 767.075(1) apply, including the delegates of the state as specified in sub.(6)
h. The state as provided for under sub. (6m)
i. A guardian ad litem appointed for the child under s. 48.235, 767.045(1)r or 938.235
j. A parent of a person listed under par. (b), (c) or (d) if the parent is liable or is potentially liable for maintenance of a child of a dependent person under s. 49.90(1)(a)(2).

[There is more to the statute, but it isnÆt relevant for this discussion.]

The constitutional right of a putative father to prosecute a paternity action had been recognized independently of the paternity statutes [then in Ch. 52] in the 1974 case of ***Slawek v. Stroh*** 62 Wis. 2d 295 (1974). The mother objecting to the determination was not married and no marital presumption applied.

Sec. 767.48 is the *general* statute applying to genetic tests in paternity actions. In relevant part, it provides:

767.48 Genetic Tests in paternity actions. (1)(a) The court may, and upon request of a party shall, require the child, the mother, any male for whom there is probable cause to believe that he had sexual intercourse with the mother during a possible time of the childÆs conception, or any male witness who testifies or will testify about his sexual relations with the mother at a possible time of conception to submit to genetic tests.

[Again the statute goes on and on but this is the relevant part for this discussion.]

The results of genetic tests are admissible to prove paternity per sec. 767.47. An exclusion is conclusive evidence of non paternity and requires a dismissal of the action as to the named male who has been excluded. sec.767.48(4). Admission of genetic tests results to prove paternity was a major change in the law, which was passed in 1979 as part of a comprehensive piece of legislation to take paternity determination out of the Ch. 52, a *quasi* criminal Chapter of the statutes entitled ôSupport of Dependentsö and move the procedures and the determination of support, custody and placement into the family code. Then recent scientific advances in genetic testing, which still required drawing blood, and also required the participation of all three parties, allowed for a reasonably accurate determination of the biological facts regarding parentage. Science has

advanced even further since then, and a simply saliva test of a child and a father is now sufficient to show whether that man is the biological father. Tests are reliable and cheap and are offered in the private market as well as through laboratories that contract with courts. In Milwaukee county there are large billboards on many buses showing a cartoon picture of a baby with a question mark over its head and the question underneath ôWhoÆs Your Daddy?ö with the name, address and telephone number of the laboratory offering paternity testing. Five laboratories also advertise in the yellow pages under ôPaternity Testingö.

The availability of accurate tests that can include as well as exclude is a wonderful thing in general, allowing accurate adjudication in a civilized manner and getting rid of the nasty trials where every detail of a motherÆs sexual practices was fodder for defense attorneys. But accurate testing also enables much meddling where the old, pre 1970Æs science was so vague that the marital presumption effectively shut out spurned boyfriends of married women and discouraged most wives and husbands from raising the issue of husbandÆs non paternity unless they had been separated totally and completely for months or years before the conception.

In 1987, during the pendency of a hotly contested paternity case filed by just such a spurned boyfriend, the legislature passed what this writer thinks was **intended** to be a narrow exception to the law that a putative father can start a paternity action and once the action is started the court has to order genetic tests if any party so requests. The legislation was originally intended to be prospective, but Governor ThompsonÆs veto gave it retroactive effect. Here is the 1987 amendment:

Sec. 767.458 First Appearance.

à

(1m) In an action to establish the paternity of a child who was born to a woman while she was married, where a man other than the womanÆs husband alleges that he, not the husband, is the childÆs father, a party may allege that a judicial determination that a man other than the husband is the father is not in the best interest of the child. If the court or circuit court commissioner under s.767.675(2)(g) determines that a judicial determination of whether a man other than the husband is the father is not in the best interest of the child, no genetic tests may be ordered and the action shall be dismissed.

In the case that evidently had inspired the statute, the Guardian *ad litem*, a young attorney named Patience Roggensack, did persuade the court to dismiss the paternity action filed by one W.W.W. to determine his paternity to two children, C.A.S. and C.D.S. born to his still married lady friend who had broken up with him and stayed with her husband. see ***In Re Paternity of C.A. S. and C.D. S.*** 161 Wis. 2d. 1015(1991)The case went to the Wisconsin Supreme

Court, with W.W.W. claiming, among other things that the statute was unconstitutional because it invaded his liberty interest in having a relationship with his progeny. The court upheld the law, but the opinion does NOT stand for the application of a wide ranging best interest exception to overcoming the marital presumption. Rather, the Supreme Court makes clear that it viewed the statute as protecting the sanctity of an intact marriage. Nor did the court overrule ***Slawek v. Stroh, supra.*** The court distinguished the case on the basis that Ms. Stroh was not married when Dr. Slawek brought the action.

> ôWe first conclude that W.W.W.Æs constitutional rights were not infringed be sec. 767.458(1m) Stats. His rights to establish his paternity of , and a relationship with the children do not warrant constitutional protection because his relationship with the children did not give rise to a liberty interest. Likewise, he does not have a statutory right to establish his paternity of C.A.S. and C.D.S. because the specific language of sec. 767.458(1m) is an exception to the statutory right to a determination of paternity granted by sec. 767.45(1)(d).
>
> p. 1021
>
> àMichael ***H.*** [Michael H. v. Gerald D. 109 S. Ct. 233 (1989)] involved a case where an unwed father had established a relationship with his natural child. Blood tests indicated a 98.07% probability he was the natural father of a child born to the wife of another man. *Michael H.* challenged the constitutionality of the Cal. Evid. Code Ann. Sec 621 (1989 West Supp.) on the ground it infringed upon his due process rights to establish a relationship with the child.
>
> The plurality opinion (Scalia, J., Rhenquist, C.J., OÆConnor, J. and Kennedy, J.) rejected the notion that biological fatherhood plus an established parental relationship was sufficient to establish a liberty interest. [Citation omitted] The plurality found that Michael. HÆs interest in a relationship with the child did not rise to the level of a liberty interest because that relationship was not historically treated as a protected family unit nor had this relationship been accorded special protections. On the contrary, they found that societal traditions had protected the marital family against claims such as Michael HÆs.
>
> p.1028

Michael H. controls the outcome of this case.

p. 1029

Our decision is not inconsistent with ***Slawek.*** à***Slawek*** did not involve a situation where the children of the alleged natural father were born into an extant marital family, so this case is distinguishable. We do not disturb ***Slawek*** or suggest that a putative father may never have a constitutionally protected right to his parentage of an illegitimate child.

p. 1031

à[W]e do not find sec, 767.458(1m) STATS to be in conflict with the policy of this state that children know the identity of their parents. This subsection represents a **narrow exception to that policy; applying only in situations where a putative father alleges that he is the natural father of the child or children born to the wife of another man.** Sec. 767.458(1m) does not automatically foreclose the possibility that a putative father may obtain a judicial determination of paternity. Rather it forecloses such a determination only when the circuit court or court commissioner determines that such a determination would not be in the best interest of the child. (emphasis supplied)

p. 1035

The court went on to emphasize that the marital couple were still together and the husband fully accepted the children as his own.

It is clear from the opinion that the Supreme Court focused on protecting an intact marriage and the fact that the boyfriend had filed an action to attack the marriage. The husband and wife were not getting a divorce and the wife had closed ranks with the husband to fend off the intruder. The court did not have to face the situation where only one of the marital partners wanted to defend against the action or where there was a pending, much less a completed divorce.

husband's not challenging but he wants to find out

Since absolutely nothing in this statute applies by its terms to a husband seeking to challenge the marital presumption as applied to himself, there is no need to further confuse the law by enacting ACT 17Æs provision that the law doesnÆt apply to a husband seeking to rebut the marital presumption of 891.41(1)

The next statutory exception allowing a court to kick out a paternity case and deny genetic testing, was, like the first, a legislative reaction to a difficult case.

In the case of ***In Re Paternity of Baby Doe: Thomas M.P. v. Kimberly J.L.*** 207 Wis. 2d 388 (Wis. App. 1996) the Circuit court for Polk county dismissed a putative fatherÆs paternity action based on a finding that adjudication would not be in the childÆs best interest. The woman was not married at the time of the childÆs birth, so the provisions of 767.458 did not, by that statuteÆs clear terms, apply. [The paternity statutes in 1996 contained no best interest escape

hatch as they originally had in 1979 because DHSS (now DWD) got them removed in a the 1986 Budget bill see Ch. 27 **LAWS** of 1987]. The mother claimed she was a rape victim; the putative father/petitioner disagreed. The judge evidently believed the mom. because he dismissed the case.

The Court of Appeals reversed the trial court, stating that the statutes clearly and unambiguously gave the petitioning man a right to go forward with a paternity action and required the court to order genetic tests upon his request. The court dismissed motherÆs claim that the statute protecting only married mothers û which would have permitted a best interest dismissal û was an unconstitutional denial of equal protection to unmarried mothers.

> ôWe are satisfied that the historic respect for the unitary family and the legislatureÆs intent to preclude interference with an otherwise secure environment for the child are sufficient reasonable grounds for the legislatureÆs classifications and the legislative classification is germane to the purpose of the law.ö
>
> p.398

The legislature answered in 1997 by restoring the best interest exception to the paternity code as part of the 1997 Budget bill û Ch. 191. The new section reads as follows:

> ***767.463 Dismissal if Adjudication not in childÆs best interest.*** Except as provided in 767.458(1m) at any time in an action to **establish** paternity of a child, upon the motion of a party or a guardian ad litem, the court or circuit court or supplemental court commissioner under 767.675(2)(g) may, with respect to a man, refuse to order genetic tests, if genetic tests have not yet been taken, and dismiss the action if the court or circuit or supplemental court commissioner determines that a judicial determination of whether the man is the father of the child is not in the best interest of the child.(emphasis supplied)

There is, so far, only one reported case interpreting this statute ***Randy AJ and Norma I J*** 2002 Wis. App. 307 (Wis. App. 2003). The Randy/Norma case did not address the issue of a husband raising a challenge to the marital presumption at all, but dealt with a divorcing wife and the biological father attempting to have the biological father adjudicated as the legal father during the contested divorce. Among other things, the Court of Appeals found that the statute only applied where genetic tests had not yet been taken. That may be a serious misreading of the statute. The case has been accepted for review by the Wisconsin Supreme Court. But for the purposes of addressing AB 17, it is sufficient to say that this statute, like 767.458 has **nothing** to say about a husband attempting to rebut the marital presumption in the first place. It is clearly addressed only to dismissal of an action in which someone seeks affirmatively to establish

paternity. Adding on some protection for husbands raising the issue of their non paternity in **this** statute will only confuse an already muddled area of the law.

However, the drafters of AB 17 do have a goal in mind, which is, apparently to stop courts from denying husbands the right to challenge the marital presumption by employing the equitable estoppel./equitable parent doctrine, which is a court created doctrine in the first place. The legislature has the power to act because determination of paternity and the law of marital dissolution is the purview of the legislature where it chooses to legislate. see ***Jocius v. Jocius*** 218 Wis. 2d 103 (Wis. App. 1998).

So, let us now look at the law of equitable estoppel as applied in marital presumption challenges. We will find that no unwilling husband has ever actually been held liable for support by the appellate court in Wisconsin despite all the fine words about recognition of the equitable parent doctrine. However, several unfaithful wives have been foreclosed from making husband/dad into step dad or having the biological father adjudicated.

In Re the Marriage of A.J.N. and J.M.N. 141 Wis. 2d 99(Wis. App. 1987) is the case which most writers cites for the proposition that a husband can be estopped from pursing a claim of non paternity in a divorce. In the actual case, the Court of Appeals did recognize the possible applicability of the doctrine of equitable estoppel but **affirmed the trial courtÆs refusal to apply it in the case.** One would never glean that fact from several later cases citing A.J.N. for the propositions that husbands can be estopped from pursuing a claim of non paternity in order to avoid paying support.

In the actual case, the wife was slightly pregnant when the parties married. Depending on whom one believed, the husband knew he might not be the biological father either before the marriage or by the time the child was eight months old. He thought no more about it until the divorce 5 years later, when he decided he wanted to know if he was the childÆs dad. A voluntary genetic test excluded him as the father and the court then had to decide whether the doctrine of equitable estoppel could be applied to the case in the first place, and whether, if it could, the facts of this case support the application. The trial court, Judge Patrick Crooks, found that the equitable estoppel doctrine was available in Wisconsin but not appropriate in this case. The Court of Appeals affirmed and had this to say:

> ôGenerally, a husband is not bound to support non marital children born to his wife. Although Wisconsin has not articulated a theory of equitable estoppel specifically applicable to child support proceedings, many other jurisdictions have. [citations omitted] We agree that if the facts are appropriate, equitable estoppel should be applied to prevent a non biological parent from denying paternity or child support.

p.103

àThe three elements that must be proven to assert equitable estoppel include: (1) an unequivocal representation of intent to support the child; (2)reliance on that representation by the natural parent or the child; and (3)detriment to the natural parent or child as a result of such reliance.

p. 106

àWhen the husband said he would love the child even if she was not his, there is nothing in this statement to indicate that he intended to provide financial support for the child if the couple divorced. Moreover, even if this statement could be construed as a promise of future support , there is no evidence of reliance or detriment. [mom didnÆt know real dad, and couldnÆt have got support from him anyway].

à

Although the husband treated the child as his for five years, we decline to permit the establishment of estoppel based solely on this basis.

Voluntary support of non marital children or stepchildren should not be discouraged. Therefore, while it is difficult to understand the husbandÆs decision to abandon the child, use of estoppel to impose a support obligation on a non biological parent must be applied cautiously. If the law imposes a permanent duty on persons who undertake to support a child they did not parent, they may choose to avoid supporting the child in order not to find themselves permanently obligated. Additionally, we should not apply the equitable estoppel doctrine to force a support obligation upon a non biological parent merely because the husband developed a close relationship with the child and nurtured them into a family unit while æactingÆ as the natural parent. This type of family relationship should be encouraged rather than discouraged through the possible consequence of becoming permanently financially obligated for child support.ö

p.106

The court also saw no problem with voluntary genetic tests being taken before a G.A.L. appointment, opining that the tests would have been ordered anyway.

Five years later, our Supreme court extended the recognition of the equitable estoppel doctrine in a case that did **not** involve a clear challenge to the marital presumption in a pending divorce or other marital action, but, rather, concerned a known **stepfather.**

Ulrich v. Cornell 168 Wis. 2d 792 (1992) reversing 162 Wis. 2d 462 (Wis. App. 1991 was a post divorce case involving a man whose status in the divorce was unclear to begin with - although it is clear that the marital presumption didnÆt apply because paternity proceedings were pending against the alleged biological dad when the parties married each other in 1979. They terminated the other manÆs rights to then 3 year old Jesse in 1980 and the husband actually signed an adoption petition. Both the Court of Appeals and the Supreme Court opinions state that the only reason the adoption didnÆt happen is that the parties ran out of money. The couple went on to have two marital children, and the husband held Jesse out as his child and actually got custody of him, along with the two younger marital children when the parties divorced in 1985. Jesse was 8 years old. The judgment of divorce did not however, **say** that the husband was the father; in fact it stated that he was in fact not the father but appended a marital settlement agreement that embodied the partiesÆ agreement that it was in the three childrenÆs best interest to remain together.

The trouble started over a year later, when Jesse went to live with mom and she sought support for him, or at least a reduction in the support she paid the ex-husband for all three children (the whopping sum of $75.00 per month). Ex husband objected to supporting Jesse because of his non paternity; mom argued equitable estoppel. The court commissioner refused to order husband to pay support and mother took a *de novo* review. Both the trial court and the Court of Appeals agreed with the mother, employing the theory of equitable estoppel to husband. He was ordered to pay $10.00 per week for Jesse and the court suspended her obligation to pay him support. So, the net loss to husband was $118.00 per month. Judge Fine dissented in the Court of Appeals decision, pointing out that this was NOT a marital presumption case and that the paternity statute, sec. 767.45 prohibited the ordering of support unless a man was covered either by the marital presumption or an adjudication or an adoption or an acknowledgment. He objected to the doctrine of equitable estoppel being extended to step parents at all, and said that the court was usurping the legislative function.

Husband appealed the order and the Supreme Court reversed the Court of Appeals, but **not** on the clear and simple basis articulated by Judge FineÆs dissent. Instead, the Supreme Court, Justice Steinmenz writing, held that:

> ôWe agree that equitable estoppel may be an appropriate doctrine to apply in some stepchild support cases. However, in this case, JesseÆs mother has failed to demonstrate to a high enough degree of certainty that she terminated the natural fatherÆs parental rights and obligations because the stepfather made an unequivocal representation of intent to support the child. Furthermore, she has not demonstrated to a high enough degree of certainty that she relied on the stepfatherÆs representation of intent to her detriment.ö

pp. 794-795

One is left to wonder what facts would be sufficient to support the claim of stepparent estoppel if these facts of attempted adoption are not. One is also left to wonder why all the courts involved didnÆt just tell the husband that the time to have clearly raised the issue of support or no support for Jesse was back when the parties got divorced, not fifteen months later.

These are the two cases involving husbands who did **not want** to be treated as fathers when the issue of support came before the court. In each case, while the courts acknowledged that some husband somewhere under some different set of facts might have to pay support for a child he didnÆt father, in neither case was the husband required to support the child once the child was longer in his care.

LetÆs look now at what happened when a wife raised the issue of non paternity during the pendency of her divorce case but the husband wished to **continue** to be recognized as the father.

In ***In Re Paternity of D.L.H.*** 149 Wis. 2d 606 (Wis. App. 1987) the wife, during a pending divorce, filed a paternity action against another man. Lo and behold, genetic tests showed the other man was the dad and her husband was not. Biological dad had no interest in being found dad and no interest in the child. The husband very much wanted to remain the legal father, and moved to dismiss the paternity action. He had known from the beginning that the child was the result of an affair his wife had but accepted the child as his and wished to continue to be the dad. He also wanted custody.

The circuit court dismissed the husband from the paternity action; he appealed, challenging both his dismissal from the action and the trial courtÆs refusal to dismiss the paternity action itself. He described himself as an ôequitable parentö, citing the Michigan case of ***Atkinson v. Atkinson*** 408 N.W. 2d 526(Mich. Ct. App. 1987).

The Court of Appeals reversed, but sent the case back for a hearing on the issue of whether the paternity case should be dismissed because mom was equitably estopped from raising the issue, having led husband to rely on her promise to let him accept the child as a marital child.

> ôWe conclude that equitable estoppel may be available as a defense to the motherÆs institution of paternity proceedings under the facts of this case....
>
> Here, because the representations or actions of the mother which are alleged to have induced the husbandÆs reliance are disputed and are not the subject of factual findings by the trial court, a remand is necessary the determine whether the elements of equitable estoppel have been met. ...

> We conclude that the considerations underlying the doctrine of æequitable parentÆ may be utilized by the trial court on remand for the purpose of determining whether the husband detrimentally relied on the motherÆs representations or conduct, if any such representations are found. We do not address the issue decided by *Atkinson*, namely, whether the æequitable parentÆ doctrine operates to elevate the husband in a divorce proceeding from third party status to a natural parent [for custody purposes].
>
> pp. 616-617

In an important sentence for the issue of what the law is or should regarding overcoming the marital presumption, the court went on to say:

> ôThe determination of the trial court on remand that the elements of equitable estoppel have been proven will not end this inquiry, however. The ultimate and overriding consideration must be the best interest of the child. Whereas in most cases estoppel will not lie because of the necessity of support from the biological father, we note here the availability of support from the husband and his apparent willingness to provide it. The guardian ad litemÆs recommendation should also be considered by the trial court for this purpose.ö
>
> p.618

So, it is clear that estoppel and best interest are be two different things. The basis for equitable estoppel must first be demonstrated **before** the court is free to apply best interest considerations.

D.L.H., supra, was decided in 1987 and left open the issue of whether the husband would have ôlegal parentö status for the purpose of custody if, in fact, the trial court on remand found the mother equitably estopped from pursuing her claim of non paternity and went on to find it in the childÆs best interest to disallow her attempt to rebut the marital presumption.

Three years later, the Court of Appeals undertook to answer the question. In ***In Re the Marriage of D.L.J. and R.R.J.*** 162 Wis. 2d 420 (Wis. App. 1991), the facts were strikingly similar to those in ***D.L. H., supra.***, but the child was much younger. The husband and wife had an on again/off again divorce which started in 1984 and ended on February 20, 1989. Wife became pregnant in 1986 and had a baby June 29, 1987. The parties re-separated in October, 1987, and picked up the divorce which was still pending. Husband sought custody, alleging

mom had a drinking problem. Wife countered with a claim of husbandÆs non paternity. The court ordered genetic tests, over the GALÆs objection, and husband was excluded as biological dad. Husband still sought to be the legal father and the GAL agreed with him. The Dane County court commissioner stopped his visitation in the summer of 1988 [child was just a year old] and the trial court found him not to be the biological father, and went on to find he was not a ôsignificant other personö in the childÆs life and denied his request for continued contact with the child.

The husband and the GAL appealed; the appellate court reversed the trial court, finding the mother equitably estopped from raising the issue of husbandÆs non paternity. And the Court of Appeals *appears* to state that if the husband continues on as the childÆs legal parent he enjoys parent status for the determination of custody and placement. While support is mentioned, the appellate opinion is silent on what, if any support the husband would be expected to pay.

The facts that moved the appellate court to find the wife estopped were:

> ...The husband and the mother lived together during at least part of the motherÆs pregnancy. The husband attended æbirthingÆ classes with the mother. The husband made the arrangements with the doctor and the hospital for the childÆs birth. The mother gave the husbands name as the father on the birth certificate. [2] He was with the mother in the delivery room during the birth. The name given the child was one chosen by the mother and the husband some years before, in anticipation of having a child. After the child came home, the husband fed her, changed her, bathed her and ætook care of her in any way she neededÆ[sic - the source of this quote does not appear in the opinion]. The husband bought the child food and clothing. The child called him ædadaÆ, seemed to enjoy his company and played with him.
>
> After their separation the mother stipulated that the husband should have generous visitation, which he exercised at every opportunity. The mother conceded that the husband saw the child æa lotÆ on weekends. Even after visitation was terminated [by the FCC, once genetic tests excluded husband as biological father], the husband continued to have frequent contact with the child. He frequently stayed overnight with the mother and the child. [opinion goes on to note that husbandÆs character witnesses said he continued to act as a dad] The husbandÆs

[2] The mother had no choice. Only a husbandÆs name may go on the birth certificate as the father of a child born to a married woman. see sec. 69. 14 STATS.

relationship with the child as the childÆs father was an active relationship which existed from the childÆs birth June 29, 1987, until the late summer of 1988.

It was not until the husband filed his motion for custody, which he alleged was prompted by his concern for the childÆs safety because of the motherÆs drinking, that the mother first claimed that the husband was not the childÆs natural father.

pp. 428-429

Unlike the court in ***D.L.H., supra***, which had remanded the issues of equitable estoppel to the trial court, this court went on to rule on both the issue of equitable estoppel and best interest because, it found, the factual record had been adequately developed in the trial court. The ***D.L.J.*** court found the mother equitably estopped from pursing her claim and noted the GALÆs argument that it would not be in the childÆs best interest to determine her actual biological paternity.

ôUnless on remand the child [by her GAL] seeks to have her paternity determined, the husband shall be considered the childÆs equitable parent for the purposes of these proceedings.

IV.
DIRECTIONS ON REMAND

On remand, the circuit court shall determine reasonable visitation between the child and the husband under sec, 767.245(1) Stats. (1985), which provides:

æA parent is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger the childÆs physical, mental or emotional health.Æ We do not consider that the childÆs notice of appeal includes that part of the judgment awarding custody of the child to the mother.

pp. 430

In both of these equitable estoppel cases, the biological father was either unknown or uninterested.

The last of the equitable estoppel/equitable parent cases relevant to our issue [overcoming the marital presumption] is the recent case of ***Randy***

A.J. and Norma I.J. 2002 Wis. 2d 307 (Wis App. 2002), Petition for review accepted Mar. 13, 2003. App. No. 02-0469.

Here, the court confronted for the first time a situation where the biological father was not a cipher, but wanted very much to establish paternity and assert parental rights; the mother intended to continue a relationship with him, and the husband also wanted to continue to be recognized as the legal father.

As in many of these cases, the facts are messy. The old saw ôhard cases make bad lawö comes to mind. But apparently, this is the case that the Supreme Court has chosen to sort out the application of the ôequitable parentö doctrine in marital presumption cases.

Randy and Norma were married to each other when Norma had a baby in January of 1998. Their marriage, and NormaÆs life, were already unraveling. Norma was involved in an ongoing affair with Brendan and, evidently, was also violating criminal laws at the same time because she was sentenced to an eight year prison term in May 1999, when the baby was 15 months old. Randy, the husband, had supported her financially throughout her troubles, using most of the marital estate to fund her unsuccessful criminal defense.

In October 1999, Randy filed for divorce, still believing that he was the now 19 month old babyÆs dad. [Brendan had filed a paternity action in Illinois in August of 1999, but it is unclear whether Randy was ever notified of that action, which was dismissed for lack of subject matter jurisdiction.]

Norma filed a counterclaim in the divorce stating that Randy was not the biological father and Brendan filed a motion to intervene in the Randy/Norma divorce and advance his claim to paternity.

Initially, Randy sought to invoke sec. 767.458 to protect against genetic tests being performed. However, he withdrew his objection to the tests and the parties went ahead with genetic tests that established the biological facts irrefutably: Brendan is the biological dad; Randy, the husband, is excluded as the biological dad.

The trial court found Norma equitably estopped from raising the issue of her husbandÆs non paternity, then dismissed the paternity action brought by Brendan, invoking both secs. 767.458 and 767.463, treated Randy as the legal parent, and gave him custody and told Brendan to go away. The GAL supported Randy throughout. Norma and Brendan appealed.

The Court of Appeals affirmed the result but Judge Brown changed the reasoning. The Court of Appeals held that sec. 767.458 didnÆt apply

because genetic tests had already been taken. Well and good - **that** statute does appear limited to a decision about whether to order the tests. The court did not address at all the more interesting issue of whether 767.458 applies at all where both the wife and the ôoutsideö man attack the marital presumption and where a divorce is going on anyway. As we have seen above, the statuteÆs constitutionality withstood attack by an spurned boyfriend where both husband and wife had joined together to seek dismissal and their marriage was ongoing. The courtÆs opinion was heavily titled toward viewing the statute as one protecting an ongoing marriage. see ***C.A.S. and C.D.S.,*** 161 Wis. 2d 1015 (1991), and discussion above. pp. 5-7.

Then Judge Brown went on to state that the best interest dismissal statute, sec. 767.463 didnÆt apply either once genetic tests had been taken. It is hard to understand how he read the statute that way because it renders the phrase ôat any timeö a nullity and seriously undercuts the legislative attempt to restore the general best interest test that applied in the original paternity law. [3]

Having found that no statute allowed the trial court to do what it did, the Court of Appeals sailed into the ôequitable parent/equitable estoppelÆ waters. Norma was equitably estopped - by her [bad girl] conduct - no new law there. The court cited the ***D.L.J., supra***, case at length, but calling it ô***J.J. v. R.J.ö*** instead, and, in keeping with its predecessor courts claimed, *erroneously,* that

> ôWe have permitted a mother in a divorce action to stop a non biological father from denying paternity in order to avoid child support obligationsö. citing ***A.M.N. v. A.J.N.*** 141 Wis. 2d 99 (Wis App. 1987) [in which, we have seen, the court did no such thing. see above, p. 9.]

The court had more trouble with Brendan. In the end the court held that the genetic test results excluding Randy and including Brendan overcame the marital presumption but didnÆt settle the issue because, **if Randy could be found to be the childÆs equitable parent,** BrendanÆs action

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[3] see sec. 767.46(2). Ch. 352 **LAWS** of 1979, in which the court is directed to make a determination about whether an adjudication is in the childÆs best interest at the pre trial conference, which was to occur after the first appearance. Blood tests were mandatory under sec. 767.48 if an party requested such tests and their availability was to be made known at the first appearance per 767. 456. So, the best interest inquiry was often made well *after* genetic tests had occurred.

could still be dismissed. Based on the trial courtÆs evidentiary record, that is just what the Court of Appeals found. The same fatherly conduct that kept the husband in ***D.L.J., supra*** ôinö as a dad - buying diapers and food and playing with the baby during the extended weekly sojourns of mom and baby with him - didnÆt do a thing for Brendan. Nor did his failed Illinois paternity action.

The Court of Appeals decision was published in January of 2003 and accepted for review in March, 2003. For now, Randy is the legal father and legal custodian. Norma is in prison or on conditional release. Newspaper accounts say Brendan is in prison also, and the opinion alludes to the substance abuse problems of the parties, not stating just which parties - one, two, or all three. If Norma eventually gets placement of her daughter, Randy will be liable for support and Brendan wonÆt. Presumably, Randy will then be equitably estopped from moving to reopen the judgment of divorce, but who knows? The little girl is now 5.

This concludes the section on what we know about existing law on overcoming the marital presumption at the time of a divorce. I would summarize the existing law as follows:

There is a marital presumption - actually there are two - but the presumption can be rebutted. The law appears to protect marriages and cuckolded husbands and to give short shrift to the claims of unfaithful wives and their boyfriends or ex boyfriends. No husband has yet been required to support a child he could prove he didnÆt father **unless** he wanted to do so. The rhetoric of court decisions is often at odds with the holdings of the cases and the legislature at least twice has enacted a statute to correct the holding of a single case without much regard for creating a comprehensive system for dealing with new scientific and societal realities.

doesn't mean it couldn't happen

Tests are accurate, can be accomplished without the participation of all three or four parties, thereby making a court order to take the test irrelevant to the person who wants a test and enabling an end run around the person who doesnÆt want a test. Genetic tests no longer require a painful needle puncture, making it seem less cruel to haul a kid off to the ôWhoÆs Your Daddyö paternity testing laboratory. Married parties of both sexes have affairs, and sometimes stay together anyway, then change their minds and get divorced after all. Female marital infidelity isnÆt the cause for permanent social ostracism that it once may have been. And everybody talks - and talks and talks and talks - to anyone who will listen, and some that wonÆt.

Before responding the AB 17, which is itself a very limited response to some husbandÆs fear he is going to have to support a child he didnÆt

father, we should turn briefly to the law of re-opening. That is because we probably want to make sure that the laws that apply to parties coming into court on the issue of paternity **for the first time** do not somehow morph into the law governing the reopening of well settled judgments. And it may well be that we want to recommend that the legislature address the issue of reopening paternity judgments or divorce judgments as to paternity separately and clearly so that the criteria for reopening are clear.

Right now, reopening a divorce judgment as to paternity is governed by Sec. 806.07 **STATS.** , which provides various grounds for relief. Most litigants miss the one year after judgment in which the judgment may be reopened on the basis of mistake, fraud or excusable neglect, so the real ôactionö in in litigation under 806.07(1)(h), which allows the court to grant relief from judgment upon a showing of extraordinary circumstances.

The bookends cases are ***E___v. E_____*** 57 Wis.2d 436(1973) and ***State ex. rel. M.L.B. v. D.G.H.*** 122 Wis. 2d 536 (1985). In the ***E__ v. E__*** case, the court favored finality over all else. The parties were divorced; husband knew child might not be his and let the child be found marital; he appeared at trial and acknowledged that the child, born well before the marriage was his. Further, the parties had, during their marriage signed an acknowledgment form allowing the childÆs name to be changed and husband to be listed as dad on the birth certificate. His later motion to reopen was thrown out because whatever evidence he was seeking to provide was either known or available at the time of the divorce. The court didnÆt care at that point that he wasnÆt the biological father. However, in ***M.L.B. v. D.G.H.*** our Supreme Court, per Judtice Abrahmson, showed great solicitude for the young man who had waived all his rights to contest his girlfriendÆs paternity action when he was just 18 but found out later he wasnÆt the dad, and had it confirmed by genetic tests the ex-girlfriend cooperated in taking. The court reversed the trial courtÆs refusal to re-open, stating:

> ôIn exercising its discretion, the circuit court should consider factors relevant to the competing interests of finality of judgments and relief from unjust judgments, including the following: whether the judgment was the result of the conscientious, deliberate and well informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim and whether there are intervening circumstances making it inequitable to grant relief.

pp. 552-553

Sec. 806.07 is the only vehicle for a husband to challenge the finding of the divorce judgment that he is the father. see ***In Re Paternity of Nathan T.; Max T. v. Carol O.*** 174 Wis. 2d 352 (Wis. App. 1993). In that case, the husband tried to use sec, 767.45 to bring a separate post divorce action to determine NathanÆs paternity. The court dismissed his action as an impermissible collateral attack on a judgment that settled the issue and told him to file a motion under 806.07 in the divorce itself.

One of the fears about AB 17 as currently drafted is that the change in the law, adding the sentence : This subsection does not apply if the husband desires to rebut the presumption under 891.41(1) that he is the father of the child. to sec 767.458 and adding the sentence: This section does not apply in an action in which a man who is presumed to be the father of the child under s. 891.41(1) desires to rebut the presumption to sec. 767.463 might somehow be read by a court as overruling the ***Nathan*** holding, resulting in endless collateral attacks on divorce judgments. Stranger things have happened when new statutes are interpreted by courts. There is a fair amount of law under sec. 806.07, and it is neither necessary nor good policy to throw it out. However, it might be good policy to refine it.

Reopening **paternity** judgments is a whole broader matter. While 806.07 certainly applies, there are three other statutes that apply too - sec. 767.465(3) and sec. 767.466, and sec. 767.62(5). They provide as follows:

767.465 Default and stipulated judgments.

...(3) MOTION TO REOPEN: A default judgment, or a judgment on stipulation unless each party appeared personally before the court at least one time during the proceeding, that is rendered under this section and that adjudicated a person to be the father of a child may be reopened:
(a) At any time upon motion or petition for good cause shown.
(b) Upon a motion under 806.07
(c) within one year after the judgment upon motion or petition, except that a respondent may not reopen more than one default judgment or more than one such stipulated judgment on p particular case under this paragraph. [remember, moms can be respondents too.]

767.466 Motion to reopen judgment based on statement acknowledging paternity. A judgment which adjudicates a person to be the father of a child and which was based upon a statement acknowledging paternity that was signed and filed before April 1, 1998,

may, if no trial was conducted, be reopened under any of the following circumstances:
(1) At any time upon motion or petition for good cause shown
(2) Upon a motion under 806.07
(3) within one year after entry of the judgment upon motion or petition.

767.62 Voluntary acknowledgment of paternity [covers acknowledgments signed after April 1, 1998]

(5)VOIDING DETERMINATION (a)A determination of paternity that arises under this section may be voided at any time upon a motion or petition stating facts that show fraud, duress, or a mistake of fact. Except for good cause shown, any orders entered under sub (4) shall remain in effect during the pendency of a proceeding under this paragraph.

(b) If a court in a proceeding under par.(a) determines that the man is not the father of the child, the court shall vacate any order entered under sub.(4) with respect to the man. the court or the county child support agency under s. 59.53(5) shall notify the state registrar in the manner provided in s. 69.15(1)(b), to remove the manÆs name from the birth certificate, No paternity action may thereafter be brought against the man with respect to the child.

Anyone who does paternity work on a regular basis knows that courts are besieged with many reopening motions by men claiming they were wrongly adjudicated, and some of them have genetic tests in hand showing exclusions. Many guys are just on fishing expeditions, but others can honestly claim newly discovered ôevidenceö. There are almost as many theories about what is sufficient to allow reopening as there are Circuit court judges deciding the issue. Perhaps there should be some legislative direction about what is ôenoughö - either to order genetic tests or to actually reopen. Right now the law of ordering genetic tests in an 806.07 motion is somewhat unusual, and was established in a motion to reopen a divorce. In ***Nehls v. Nehls*** 151 Wis. 2d 51 (Wis. App. 1989), the Court of Appeals held that, under certain circumstances, the trial court should go ahead and order genetic tests in an 806.07 proceeding as a discovery tool and **then** decide whether to reopen.

Mr. Nehls, in his motion to reopen, claimed his wife told him **after** the divorce that he wasnÆt the dad. He ignored her until gossip got back to him through his own sister that the ex wife was proclaiming his non paternity to others. At that point he decided he wanted to reopen and stop paying support if he wasnÆt the father. The circuit court said ôno wayö, and the court of appeals reversed, stating:

ôIt is merely fortuitous that the parties in M.L.B. cooperated in taking the HLA tests. It would be unfair if one party could prevent the just result reached in M.L.B. by an unreviewable refusal to participate in the test that permitted relief in that case. However, the adjudicated father must produce something more than curiosity or speculation to be entitled to any relief, because proceedings of this sort must not be used as fishing expeditions for recreational litigation. ...

p. 521

Once Michael has finished his discovery, the trial court will be able to use the M.L.B. considerations to decide whether, in the exercise of its discretion, it should reopen the divorce judgment to permit Michael to contest the issue of JoshuaÆs paternity.ö

p.522

In a later decision, the Court of Appeals clarified that before actually reopening the judgment, the court should appoint a GAL for the child. The court also held that reopening was still a discretionary determination even where grounds had been shown, and that consideration of a childÆs best interest was relevant to that exercise of discretion. see ***Johnson v. Johnson*** 157 Wis. 2d 490 (Wis. App. 1990)[4]

This concludes my review of where we are right now, with the marital presumption, the equitable estoppel/equitable parent doctrine, and the law of reopening. What follows is my summary of the policy questions.

1. Is it fair to hold either a husband **or** a wife to a marital presumption just because they held a child out as marital during an ongoing marriage when one or both of them at divorce, or other marital action based on their separation, wants to put forth evidence showing that the husband is not the father?

Under our current law, at least as articulated if not exactly as applied, both parents *could* be estopped by conduct from trying to rebut the marital

[4]Many of the requests to reopen based on newly discovered evidence consist of ôshe told me...ö or ôshe told my cousin, who told me...ö Not everyone fares so well as Mr. Nehls. see ***In Re LSG*** 170 Wis. 2d 231 (Wis. App. 1992), where the Court of Appeals upheld the trial courtÆs denial of the young manÆs motion to reopen, distinguishing Nehls because LSG was a paternity case in which heÆs been given his rights and waived them before being adjudicated, whereas Nehls was presumed to be the dad in his divorce. One wonders if the real distinction is the courtÆs alarm about opening the floodgates to reopenings if everyone who hears gossip now gets a genetic test as ôdiscoveryö. One interpretation is to see ***LSG*** as the courtÆs way of limiting the application of both *MLB v DGH , supra* and ***Nehls, supra.***

presumption at the time of divorce on the theory that they had led the child to rely on their being his/her legal parents. Some commentators might like this to be the law. No court has ever done this, and it is unlikely that a court would do so confronted by two marital partners who both want the biological facts to be brought out and to govern the decision. The law of protecting the marital presumption is at least as much about which adults the law wishes to protect as it is about the interest of children.

2. If the legislature is going to reign in courtÆs ability to apply the equitable parent/equitable estoppel doctrine in order to thwart claims of non paternity, is it fair to treat husbands differently than wives? If a child has an interest in an accurate family history and in knowing the truth of his/her parentage, that interest is the same no matter whose fault it is that the relevant information was concealed or hushed up during an ongoing marriage.

We have seen that, in practice it is women who have been actually estopped from raising the issue of a husbandÆs non paternity on the basis that the woman, knowing the facts, has misled the husband. In fact, some of the ladies did mislead but others were quite frank. The rationale that people should not later be held to their marital ôdealö when the marriage breaks up has worked for men (A.J.N., Mr. Ulrich), but not women. Is this fair? Or would it be better to recognize that people who are in an ongoing relationship, trying to save a marriage, often agree to live out certain fictions because it is in *everyoneÆs* best interest to do so *as long as* they are living as a family. For instance, there are often several children covered by the marital presumption in families where one or more of those children may actually be husbandÆs but one or more others are not. Everyone is going to eat supper at the same table and breathe the same air in the house as long as the couple is together. If we have laws that hold marital partners are easily estopped from raising issues of non paternity, one result may be to encourage actions to rebut the marital presumption where the parties are still married, or notarized statements of non paternity and non assumption of parental responsibility for some children in intact marriages, in order to avoid a later finding that it is too late to raise the issue due to parent like conduct during an ongoing marriage. Is this a good idea? I think not.

3. Should the genetic test issue be separated from the ôequitable estoppel/equitable parentö issue? When either marital partner wants to raise the issue of the husbandÆs non biological paternity, it really isnÆt likely that issue is going away until the facts are known - with or without court assistance or approval. It would be possible to have a law that tells the courts to order the test - or accept results of reliable tests already performed - to determine the issue of biological paternity, but allows the court to go on to determine whether the parent raising the issue of non

paternity is estopped by conduct from relying on the test results to overcome the marital presumption if the court also found that making that determination was in the childÆs best interest because of the childÆs close relationship with the husband and the childÆs lack of any relationship with the biological father due to the conduct of the parties. This is, in fact, pretty close to current law.

Or, we could have a law that says the biological facts govern, period, but provide for giving custody to the [now] stepparent if there are compelling reasons for doing so, and allow the court to order stepparent support if the facts show that the mother or child relied to their detriment on the husbandÆs promise to support the child. We already have a law that allows a court to order stepparent visitation. (Current sec. 767.245 was enacted in 1987 but wasnÆt effective until 1988, which is one reason ***D.L.J., supra*** was decided as an equitable parent case.) This is slightly different from option one because it does allow for the possibility of ôthis child has two fathersö and refines the law of when the step dad can be held liable for support.

4. Since the law allows parties to raise claims to rebut the marital presumption, do we want them to do so at the earliest opportunity in a court proceeding, then bar them later? For instance, what about actions to compel support filed under 767.08 or independent actions for support under 767.02(1)(f) or for custody under 767.02(1)(e) where no divorce or legal separation or annulment is pending? If we want to establish the facts clearly and fairly before a child has come to rely upon the relationship, then we should hold that an order in an independent action for support settles the issue of whether the husband is the father and then he may not raise the issue in a later divorce. If we do *that,* then the law must provide for telling the parties in an independent action for support or custody to ôspeak now or forever hold your peaceö on the issue of the marital presumption. If someone does come into court in an independent support action and blurts out ôthat one isnÆt mine/hisö do we require a written motion in the case or require a separate action to rebut the presumption? Remember, many of these litigants are indigent or ill educated and unrepresented by counsel to begin with.

5. Do we want to keep the law that protects the marriage from the spurned boyfriend by requiring a best interest inquiry before he is allowed to proceed. (I would say yes, but only where both marital partners oppose the boyfriendÆs action - and I think that was the original intent of 767.458(1m).)

6. In marital presumption challenges brought timely at the very beginning of a divorce or legal separation or independently to rebut a presumption without a divorce or legal separation, do we want to require some showing

of some reason beyond mere curiosity before ordering genetic tests? That may be a foolÆs errand because anyone who wants the test can fashion some reasonable suspicion to put in his/her motion.

In working on this paper, which has grown far beyond the simple two page memo I originally envisioned, I have developed some suggestions.

1. **Scrap AB 17 -** not because its sentiments are bad but because it is a poor draft and the people it seeks to protect - husbands - havenÆt actually gone unprotected under current **appellate** law yet anyway. Further, the two statutes affected donÆt have **anything** to do with husbandsÆ seeking to overcome the presumption in the first place. However, there is a real danger that the language of the bill as drafted will open a new avenue for reopening motions.

2. Amend 767.458 (1m) to clarify that both marital parties need to object before the court dismisses a manÆs petition for paternity employing a best interest test when he is not the husband and the marital presumption otherwise applies.

3. Amend sec. 767.463 to clarify it may be applied whether or not genetic tests have been taken.[5]

4. Create a new subsection of sec. 891.41 or 891.39 on rebutting the marital presumption, state that it is the exclusive procedure for determining whether a child is a marital child before the entry or orders in a divorce, independent action for support or custody or legal separation, or annulment and provide as follows:

> a. Any party to the action may by response, counterclaim or motion raise the issue of husbandÆs non paternity before the entry of a judgment or order finding him to be the father or imposing support or granting custody. Have the summons say that.
>
> b. Upon request by any party the court shall order genetic tests .
> c. Before determining that the marital presumption has been overcome, the court shall appoint a guardian ad litem to represent the child.
>
> d. The court shall determine whether either parent has conducted himself or herself in such a manner that s/he is estopped from pursing a his or her claim to rebut the marital presumption. Relevant factors include but are not limited to:

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[5] The recodification committee for Ch. 767 has already drafted this provision.

-whether one spouse deliberately concealed relevant facts regarding the childÆs conception from the other.
-when the spouse now seeking to overcome the presumption knew all of the relevant facts about the childÆs conception.
-whether the spouse now seeking to overcome the presumption had led the other spouse reasonably to believe that he or she would not raise the issue of non paternity in a court proceeding.
-whether the spouse defending the marital presumption relied to his or her detriment on the representations of the spouse now seeking to overcome the presumption.
-whether the spouse now seeking to overcome the presumption has encouraged the child in the belief that the husband is the father and encouraged the other spouse to rely upon the marital presumption in the assumption of parental responsibilities and privileges.

(e) If the court finds that the parent seeking to overcome the presumption is subject to a finding of equitable estoppel, the court shall proceed to determine whether it is nonetheless in the childÆs best interest to allow that parent to rebut the presumption and go on to determine paternity according to sec. 767.45 STATS. Relevant factors include but are not limited to:

- whether the biological facts are already known to the child
- the age of the child
- the nature of the relationship between the child and the husband
- whether the identity of the biological father is known
- the nature of the relationship, if any, between the mother and the biological father
- the nature of the relationship, if any, between the biological father and the child
- whether the biological father, if interested, is a fit or proper person to exercise parental responsibility
- whether the husband wishes to continue to exercise parental responsibilities even if he is not the biological father.

These are a lot of factors, but, then, there are many factors.

5. Clarify the law of reopening determinations of paternity in divorces or paternity adjudication - including acknowledgments - to provide:

a) Reopening a judgment determining a child to be a marital child is governed strictly be sec. 806.07. While there is a case saying so, it wouldnÆt hurt to have the statute confirm that.

b) Reopening paternity adjudication, including those based on acknowledgments, are governed by one law and are allowed:

-within one year if the judgment was a default
-at any time upon written motion and good cause shown
-per 806.07.

I donÆt think we need three separate and slightly different statutes to confuse the issue. Voluntary acknowledgments under the ônewö law will still be good; reopening based on good cause is different from recission, which the federal law prohibits after 60 days. The current provision for voiding the acknowledgment based on ômistake of factö has no independent Wisconsin law to support it, whereas we do have at least *some* reopening law about good cause or 806.07 grounds.

These are my thoughts as I head off the North Carolina for a few days. I am sending this paper to Dan Rossmiller and Barb McCrory as an attachment translated into a a version of WORD I hope people can read. I know we will have a lively discussion at both the FCC meeting and at the State Bar Family Law Section meeting.

Dated at Milwaukee, April 23, 2003. (edited May 19, 2003)

Lucy Cooper

Lucy Cooper

home phone (414) 344-6075

She is home Wed afternoons and
Thursdays and Fridays

especially not reopen

phone conversation w/ Lucy Cooper Thurs. 9-4
in divorce a + i 891.39

in div, legal sep.

either parent may raise
that issue that
child is not
a marital child
before final judgment

the whole new order

891.39 ← add to 885.23 order genetic tests

clarify that add but that dismissal not allowed by parties want to file on limit to pending actions

(1) in divorce, legal, support (767.45)
by husband and wife want to rebut
presumption

(2) 3rd party dvrc starts pat actn

(3) rebut presumption during marriage (767.458)

(3) reopening a case
take out change to 767.458

* add: not allow reopening must use 806....
fn 967.458 (1m) ↗

get rid of 767.463 because "rebutting presumption" would not happen in an action to establish paternity

under 767.458 → either party wants to rebut presumption in an action but not brought by a third party

in a divorce, or ongoing marriage, action to rebut presumption would only be under 891.39?
(767.45 is irrelevant?)

what about reopen? not even if 806.07 applies?

make provision that apply to .....

(can they bring a new action to rebut? just not reopen divorce?)

either party or just husband?

State of Wisconsin
2003 – 2004 LEGISLATURE

LRBs0169/1 P1
PJK:kmg

PRELIMINARY DRAFT – NOT READY FOR INTRODUCTION

ASSEMBLY SUBSTITUTE AMENDMENT ,

TO 2003 ASSEMBLY BILL 17

D-note (Tues, please)

AN ACT ...; **relating to:** prohibiting dismissing in a child's best interest an action or proceeding to rebut a presumption of paternity.

Analysis by the Legislative Reference Bureau

Under current law, a man who was married to the mother of a child when the child was born or conceived is presumed to be the father of the child. The man may bring an action to rebut that presumption. The presumption is rebutted if the results of genetic tests show that the husband is excluded as the father of the child or that another man is not excluded as the father of the child and the probability that the other man is the father is 99% or higher. Current law also provides that in a paternity action brought by a man alleging that he, not the mother's husband, is the father of a child, a judge or court commissioner may refuse to order genetic tests and dismiss the action if, upon the motion of a party or guardian ad litem, the judge or court commissioner determines that it is not in the child's best interest to determine whether a man other than the mother's husband is the father.

This ~~bill~~ provides that, regardless of a child's best interest, a judge or court commissioner may not refuse to order genetic tests, may not refuse to admit the results into evidence, and may not dismiss a paternity action or an action or proceeding to rebut the presumption of paternity if the child's mother or the man who is presumed to be the father of the child because he is the mother's husband desires

substitute amendment

percent

FE-S

substitute amendment

to rebut the presumption that the husband is the father. The ~~bill~~ also provides that the provision under current law that sets out the bases for reopening judgments and orders applies to a motion to reopen a divorce or legal separation judgment or a judgment or order for child or family support on the basis that a presumption of paternity is rebutted.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 767.458 (1) (c) of the statutes is amended to read:

767.458 **(1)** (c) Except as provided under sub. (1m) (a) and s. 767.463 the respondent may request the administration of genetic tests which either demonstrate that he is not the father of the child or which demonstrate the probability that he is or is not the father of the child;

History: 1979 c. 352; 1983 a. 447 s. 34; Stats. 1983 s. 767.457; 1987 a. 27 ss. 2136t, 2137d, 2137e; Stats. 1987 s. 767.458; 1987 a. 403, 413; 1993 a. 16, 481; 1995 a. 100; 1997 a. 191; 2001 a. 61.

SECTION 2. 767.458 (1) (d) of the statutes is amended to read:

767.458 **(1)** (d) Except as provided in subs. (1m) (a) and (2) and s. 767.463, the court will order genetic tests upon the request of any party; and

History: 1979 c. 352; 1983 a. 447 s. 34; Stats. 1983 s. 767.457; 1987 a. 27 ss. 2136t, 2137d, 2137e; Stats. 1987 s. 767.458; 1987 a. 403, 413; 1993 a. 16, 481; 1995 a. 100; 1997 a. 191; 2001 a. 61.

SECTION 3. 767.458 (1m) of the statutes is renumbered 767.458 (1m) (a).

SECTION 4. 767.458 (1m) (b) of the statutes is created to read:

767.458 **(1m)** (b) Notwithstanding par. (a), if either the woman or the husband desires to rebut the presumption under s. 891.41 (1) that the husband is the father of the child, the court or circuit or supplemental court commissioner may not refuse to order genetic tests and may not dismiss the action on the basis that a determination that the husband is not the father of the child is not in the child's best interest.

SECTION 5. 891.39 (1) (a) of the statutes is amended to read:

891.39 **(1)** (a) Whenever it is established in an action or proceeding that a child was born to a woman while she was the lawful wife of a specified man, any party asserting in such action or proceeding that the husband was not the father of the child shall have the burden of proving that assertion by a clear and satisfactory preponderance of the evidence. In all such actions or proceedings the husband and the wife are competent to testify as witnesses to the facts. The court or judge in such cases shall appoint a guardian ad litem to appear for and represent the child whose paternity is questioned. If either the husband or the wife desires to rebut the presumption of paternity under s. 891.41 (1), the court may not refuse to order genetic tests, may not refuse to admit the results of the genetic tests into evidence, and may not dismiss the action or proceeding on the basis that a determination that the husband is not the father of the child is not in the child's best interest. Results of a genetic test, as defined in s. 767.001 (1m), showing that a man other than the husband is not excluded as the father of the child and that the statistical probability of the man's parentage is 99.0% or higher constitute a clear and satisfactory preponderance of the evidence of the assertion under this paragraph, even if the husband is unavailable to submit to genetic tests, as defined in s. 767.001 (1m).

History: 1971 c. 298; 1979 c. 196; 1979 c. 352 s. 39; 1983 a. 447; 1985 a. 315; 1989 a. 122; 1993 a. 16, 486; 1995 a. 27, 225; 1997 a. 191.

SECTION 6. 891.39 (4) of the statutes is created to read:

891.39 **(4)** Section 806.07 applies to any motion to reopen a judgment of divorce or legal separation or an order or judgment for child or family support on the basis that the man presumed to be the father of a child under s. 891.41 (1) is not the child's father.

(END)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBs0169/1dn P1
PJK:...

Joe:

Although we had decided that what was wanted for the reopening issue was to prohibit the ability to reopen a divorce, etc., judgment on the basis of rebutting the paternity presumption, I double–checked Lucy Cooper's memo and found on page 26 that, instead of prohibiting reopening, she proposed clarifying that s. 806.07 applies under current law. I limited the language to reopening divorces, legal separations, and judgments or orders for support. Since this is not a change from current law, no initial applicability is needed.

As we discussed, this first version is a preliminary draft that I expect will need changes. At least it is a step toward the modifications Lucy Cooper wanted to see.

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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBs0169/P1dn
PJK:kmg:pg

September 8, 2003

Joe:

Although we had decided that what was wanted for the reopening issue was to prohibit the ability to reopen a divorce, etc., judgment on the basis of rebutting the paternity presumption, I double–checked Lucy Cooper's memo and found on page 26 that, instead of prohibiting reopening, she proposed clarifying that s. 806.07 applies under current law. I limited the language to reopening divorces, legal separations, and judgments or orders for support. Since this is not a change from current law, no initial applicability is needed.

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Joe Hoey 9-15

add on p 3 after "s. 891.41(1)" :

in an
before the entry of a judgment (action)

affecting ~~the family~~ under s. 767.02

(1)(b), (c), (d), (e)

add : "or refuse to admit results
into evidence" on p. 2

and delete part about "may not
dismiss action"

on p3, also delete part about
"may dismiss action"

9-16 Joe Hoey on p3, add "(L)" to
the list of family actions

State of Wisconsin
2003 – 2004 LEGISLATURE

LRBs0169/P1
PJK:kmg:pg

~~PRELIMINARY DRAFT – NOT READY FOR INTRODUCTION~~

ASSEMBLY SUBSTITUTE AMENDMENT ,

TO 2003 ASSEMBLY BILL 17

AN ACT ***to renumber*** 767.458 (1m); ***to amend*** 767.458 (1) (c), 767.458 (1) (d) and 891.39 (1) (a); and ***to create*** 767.458 (1m) (b) and 891.39 (4) of the statutes; **relating to:** ~~prohibiting dismissing in a child's best interest an action or proceeding to rebut~~ presumption of paternity.

Analysis by the Legislative Reference Bureau

Under current law, a man who was married to the mother of a child when the child was born or conceived is presumed to be the father of the child. The man may bring an action to rebut that presumption. The presumption is rebutted if the results of genetic tests show that ~~the husband is excluded as the father of the child or that~~ another man is not excluded as the father of the child and the probability that the other man is the father is 99 percent or higher. Current law also provides that in a paternity action brought by a man alleging that he, not the mother's husband, is the father of a child, a judge or court commissioner may refuse to order genetic tests and dismiss the action if, upon the motion of a party or guardian ad litem, the judge or court commissioner determines that it is not in the child's best interest to determine whether a man other than the mother's husband is the father.

This substitute amendment provides that, regardless of a child's best interest, a judge or court commissioner may not refuse to order genetic tests, ~~may not~~ refuse

to admit the results into evidence, and may not dismiss a paternity action or an action or proceeding to rebut the presumption of paternity if the child's mother or the man who is presumed to be the father of the child because he is the mother's husband desires to rebut the presumption that the husband is the father. The substitute amendment also provides that the provision under current law that sets out the bases for reopening judgments and orders applies to a motion to reopen a divorce or legal separation judgment or a judgment or order for child or family support on the basis that a presumption of paternity is rebutted.

For further information see the ***state*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 767.458 (1) (c) of the statutes is amended to read:

767.458 **(1)** (c) Except as provided under sub. (1m) (a) and s. 767.463, the respondent may request the administration of genetic tests which either demonstrate that he is not the father of the child or which demonstrate the probability that he is or is not the father of the child;

SECTION 2. 767.458 (1) (d) of the statutes is amended to read:

767.458 **(1)** (d) Except as provided in subs. (1m) (a) and (2) and s. 767.463, the court will order genetic tests upon the request of any party; and

SECTION 3. 767.458 (1m) of the statutes is renumbered 767.458 (1m) (a).

SECTION 4. 767.458 (1m) (b) of the statutes is created to read:

767.458 **(1m)** (b) Notwithstanding par. (a), if either the woman or the husband desires to rebut the presumption under s. 891.41 (1) that the husband is the father of the child, the court or circuit or supplemental court commissioner may not refuse to order genetic tests and may not dismiss the action on the basis that a determination that the husband is not the father of the child is not in the child's best interest.

SECTION 5. 891.39 (1) (a) of the statutes is amended to read:

891.39 **(1)** (a) Whenever it is established in an action or proceeding that a child was born to a woman while she was the lawful wife of a specified man, any party asserting in such action or proceeding that the husband was not the father of the child shall have the burden of proving that assertion by a clear and satisfactory preponderance of the evidence. In all such actions or proceedings the husband and the wife are competent to testify as witnesses to the facts. The court or judge in such cases shall appoint a guardian ad litem to appear for and represent the child whose paternity is questioned. If either the husband or the wife desires to rebut the presumption of paternity under s. 891.41 (1), the court may not refuse to order genetic tests, may not refuse to admit the results of the genetic tests into evidence, and may not dismiss the action or proceeding on the basis that a determination that the husband is not the father of the child is not in the child's best interest. Results of a genetic test, as defined in s. 767.001 (1m), showing that a man other than the husband is not excluded as the father of the child and that the statistical probability of the man's parentage is 99.0% or higher constitute a clear and satisfactory preponderance of the evidence of the assertion under this paragraph, even if the husband is unavailable to submit to genetic tests, as defined in s. 767.001 (1m).

SECTION 6. 891.39 (4) of the statutes is created to read:

891.39 **(4)** Section 806.07 applies to any motion to reopen a judgment of divorce or legal separation or an order or judgment for child or family support on the basis that the man presumed to be the father of a child under s. 891.41 (1) is not the child's father.

(END)

2003–2004 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBs0169/1ins
PJK:kmg:pg

INSERT A ✓

wdf, before judgment is entered in an annulment, divorce, legal separation, custody, or paternity action,

(END OF INSERT A)

INSERT 3 ✓

wdf before the entry of a judgment in an action affecting the family under s. 767.02 (1) (b), (c), (d), (e), or (L)

(END OF INSERT 3)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBs0169/1dn
PJK:kmg:pg

Joe:

After hearing the arguments in *Randy A.J. v. Norma I. J. and Brendan B.* on Tuesday, I can see how very confused, and confusing, this issue is, including construction of the statutory sections that have an effect on the issue. I think the only type of action (in this substitute amendment) that it makes sense to dismiss is a paternity action brought by a man who alleges himself to be the father (it wouldn't make sense, for example, to dismiss a divorce action if the husband wants to rebut the presumption and the court determines that it would not be in the child's best interest to determine whether another man is actually the father). Therefore, there does not seem to be a problem with leaving out the dismissal language in s. 891.39 (1) (a). In s. 767.458 (1m), however, there seems to be a gaping hole (on dismissal) in the new language because of the language in current law on dismissal. I don't know how judges would interpret it, and I'm not sure what I would say if I were asked whether judges *may* dismiss in the child's best interest (if the test results showed that the husband was not the father) without explicit permission or an explicit prohibition. The issue of effectively terminating parental rights by using the equitable parent doctrine is the issue before the Supreme Court in the case mentioned above. Hopefully, they will sort it all out for us! I can now understand Lucy Cooper's reluctance to "meddle" further with these statutes.

As we discussed, germaneness may also be an issue with this substitute amendment, since the scope is arguably expanded with the amendment to s. 891.39 (1) (a).

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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBs0169/1dn
PJK:kmg:ch

September 17, 2003

Joe:

After hearing the arguments in *Randy A.J. v. Norma I. J. and Brendan B.* on Tuesday, I can see how very confused, and confusing, this issue is, including construction of the statutory sections that have an effect on the issue. I think the only type of action (in this substitute amendment) that it makes sense to dismiss is a paternity action brought by a man who alleges himself to be the father (it wouldn't make sense, for example, to dismiss a divorce action if the husband wants to rebut the presumption and the court determines that it would not be in the child's best interest to determine whether another man is actually the father). Therefore, there does not seem to be a problem with leaving out the dismissal language in s. 891.39 (1) (a). In s. 767.458 (1m), however, there seems to be a gaping hole (on dismissal) in the new language because of the language in current law on dismissal. I don't know how judges would interpret it, and I'm not sure what I would say if I were asked whether judges *may* dismiss in the child's best interest (if the test results showed that the husband was not the father) without explicit permission or an explicit prohibition. The issue of effectively terminating parental rights by using the equitable parent doctrine is the issue before the Supreme Court in the case mentioned above. Hopefully, they will sort it all out for us! I can now understand Lucy Cooper's reluctance to "meddle" further with these statutes.

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State of Wisconsin
2003 – 2004 LEGISLATURE

LRBs0169/1
PJK:kmg:ch

ASSEMBLY SUBSTITUTE AMENDMENT ,

TO 2003 ASSEMBLY BILL 17

AN ACT ***to renumber*** 767.458 (1m); ***to amend*** 767.458 (1) (c), 767.458 (1) (d) and 891.39 (1) (a); and ***to create*** 767.458 (1m) (b) and 891.39 (4) of the statutes; **relating to:** ordering genetic tests when a child's mother or her husband desires to rebut the presumption of paternity.

Analysis by the Legislative Reference Bureau

Under current law, a man who was married to the mother of a child when the child was born or conceived is presumed to be the father of the child. The man may bring an action or a motion in another action, such as a divorce, to rebut that presumption. The presumption is rebutted if the results of genetic tests show that another man is not excluded as the father of the child and the probability that the other man is the father is 99 percent or higher. Current law also provides that in a paternity action brought by a man alleging that he, not the mother's husband, is the father of a child, a judge or court commissioner may refuse to order genetic tests and dismiss the action if, upon the motion of a party or guardian ad litem, the judge or court commissioner determines that it is not in the child's best interest to determine whether a man other than the mother's husband is the father.

This substitute amendment provides that a judge or court commissioner may not refuse to order genetic tests or refuse to admit the results of the tests into evidence if, before judgment is entered in an annulment, divorce, legal separation, custody, or paternity action, the child's mother or the man who is presumed to be the

father of the child because he is the mother's husband desires to rebut the presumption that the husband is the father. The substitute amendment also provides that the provision under current law that sets out the bases for reopening judgments and orders applies to a motion to reopen a divorce or legal separation judgment or a judgment or order for legal custody or child or family support on the basis that a presumption of paternity is rebutted.

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SECTION 5. 891.39 (1) (a) of the statutes is amended to read:

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(END)